Criminal Law and Procedure

Gerald S. Gold

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the Ohio Supreme Court held that despite the new statutes, the authority to admit to the practice of law is exercised only by the court itself. Since the Supreme Court Rules governing the practice of law provide that only natural persons may be admitted to the practice of law in Ohio, attorneys will still be prohibited from incorporating. The court said further that to the present members of the Ohio Bar, judging from the briefs submitted, the issue was an emotional thing, much like "cats, olives and Roosevelt" — either enthusiastically embraced or resolutely rejected.

GEORGE N. GAFFORD

CRIMINAL LAW AND PROCEDURE

EVIDENCE AND PROCEDURE

Search and Seizure

The most important case affecting Ohio criminal law in 1961 was decided by the United States Supreme Court in Mapp v. Ohio. As a result of this decision, evidence illegally obtained by law enforcement officers is inadmissible in a criminal trial in a state court if timely objection is made. The federal exclusionary rule is now held to be a substantive part of the fourth amendment as applied to the states through the fourteenth amendment. The state courts must now determine to what extent they will be bound by the many decisions of the United States Supreme Court and the lower federal courts in the field of search and seizure. Are these varied and sometimes irreconcilable precedents to be regarded as substantive constitutional interpretations applicable to both state and federal courts, or, will the Supreme Court allow state courts to hold state law enforcement officers to less rigid standards than do the federal courts? It is important to effective, intelligent law enforcement that the state courts establish judicial guideposts with dispatch.

Withdrawal of Plea

In State v. Matthes the defendant, represented by counsel, pleaded guilty to several counts of violating the Ohio Securities Act. After sentence to the Ohio Penitentiary was imposed, the defendant moved to withdraw his plea of guilty because he had not realized the effect of such a plea on his future ability to engage in the insurance business. The trial

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23. Ohio Revised Code sections 1785.01-.08 inclusive became effective on October 17, 1961.
24. Rule XIV of the Supreme Court Rules of Practice.
court denied the motion. The court of appeals held that the trial court abused its discretion in not allowing the withdrawal of the guilty plea. The court of appeals held that a defendant should know the consequences of pleading guilty to a felony charge, and if he does not, the trial court should allow him some latitude for withdrawing a plea.\(^6\)

**Impeachment by Prior Misdemeanor Conviction**

In *State v. Murdock\(^7\)* the Ohio Supreme Court held that a defendant in a criminal case may be impeached as a witness by showing a conviction of a misdemeanor not involving *crimen falsi*. The defendant, charged with driving while under the influence of alcohol, was asked over objection whether he had previously been convicted of the same crime. The defendant, on appeal, argued that his previous conviction was for violating a municipal ordinance and not a state statute.\(^8\) The court held that the bill of exceptions filed by the defendant failed to disclose that the offense to which the question related was not a violation of a state statute. A witness may therefore be impeached by showing a conviction under a state statute whether misdemeanor or felony. The Ohio Supreme Court has not yet decided whether an impeachment may result by showing a violation of a municipal ordinance which could also be a violation of the state code.\(^9\) It is interesting to note that the question

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3. A number of recent law review articles have surveyed the federal and state decisions in this field in the light of the *Mapp* case. See, e.g., Day & Berkman, *Search and Seizure and the Exclusionary Rule*, 13 *West. Res. L. Rev.* 57 (1961). This article takes the position that the same rules governing admissibility of illegally seized evidence in federal courts should be applied to state courts.
4. It is interesting to note that, until the United States Supreme Court hearing on *Mapp*, the main question argued by both sides in the Ohio courts was the constitutionality of the Ohio obscenity statute. Schroeder, *Survey of Ohio Law — Constitutional Law*, 12 *West. Res. L. Rev.* 470 (1961).
6. It would seem that a thorough examination of the defendant by the trial judge in open court regarding the defendant's understanding of the consequences of his plea would avoid any misunderstanding. It was not the intent of the court of appeals to allow a defendant the opportunity to determine his sentence and, if he does not like it, withdraw his plea and go to trial.
7. 172 Ohio St. 221, 174 N.E.2d 543 (1961). See also discussion in *Evidence* section, p. 483 *infra*.
8. The court is apparently placing the burden of showing that the offense was a violation of a municipal ordinance on the defendant. In this case, however, if the defendant had been convicted of an ordinance violation, was it the same *crime*?
9. In *State v. Hamm*, 104 N.E.2d 88 (Ohio Ct. App. 1951), the court of appeals held that a conviction under an ordinance which could also have been a conviction under a statute could be used for impeachment purposes. A conviction for a city ordinance violation not also a statutory violation has been held not admissible to impeach a witness. Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922).
propounded in the present case was for impeachment purposes and was not asked as a back-door method of proving a like and similar act.

**Like and Similar Acts**

In a prosecution for sodomy the trial court instructed the jury that the state was allowed to introduce testimony as to certain acts of the defendant for the limited purpose of showing his moral disposition and perversity, since a person with such a disposition would be more inclined toward the crime charged. The defendant contended that the testimony admitted was not within the purview of section 2945.59 of the Ohio Revised Code. A majority of the Ohio Supreme Court stated that although the wording of the trial court's instruction was unfortunate, it was not prejudicial. A strongly-worded dissent pointed out that admission of hearsay, telephone calls, and the like, even for such a limited purpose, was so erroneous that it would probably be prejudicial.

It appears to the author that the dissenters have taken a more practical view of the effect of this testimony. Although a trial court instructs a jury as to the limited purpose of testimony, its admission has a great impact upon a jury. Great care should be taken in allowing testimony as to "like and similar acts" or the prosecution will place the defendant's character and criminal record in evidence indiscriminately, thereby clouding the factual issue of the case at trial.

In *State v. Chapman* the defendant was convicted of incest. At the trial the sister of the prosecutrix testified as to sexual relations with the defendant eight years earlier. The court of appeals reversed the conviction, because the so-called like and similar act was too remote in time to show a course of conduct.

Remoteness in time is certainly a factor in determining a course of conduct. However, it seems that high speed transportation has removed the remoteness of locale as a factor in determining admissibility of "similar acts."

**Former Jeopardy**

In *State v. Downey* the defendant, claiming former jeopardy, objected to a declaration of mistrial by the trial court. The appellate court

11. This section allows the state to introduce acts of the defendant which are like and similar to the offense charged for the limited purpose of showing the defendant's motive, intent, lack of mistake, identity, or *modus operandi*.
held that the declaration of mistrial was not a final order and the claim of former jeopardy could be made only as a plea at the subsequent trial as provided by statute.\textsuperscript{15}

The statutory procedure was followed in \textit{State v. McGraw}.\textsuperscript{16} A jury trial had been in progress for several days when the prosecuting attorney realized that the indictment did not allege "purpose to kill," a requisite for murder in the first degree. The state moved for a discontinuance of the case based on section 2945.14 of the Ohio Revised Code.\textsuperscript{17} The motion was granted over objection by the defendant. A new indictment properly charging first degree murder was returned and the defendant was arraigned. The defendant entered a written plea of former jeopardy, to which the state demurred. The court overruled the demurrer and discharged the defendant. The court held that the statute relied upon by the state for the discontinuance could only apply when there was a variance between the evidence and the offense charged. The court said that jeopardy attached when the jury was sworn so long as the defendant could have been convicted on a valid indictment by the evidence presented. In the present case, although first degree murder was not properly charged, the defendant, on the first indictment could have been convicted of first degree manslaughter, a lesser included offense of murder. The improper discontinuance operated as an acquittal of manslaughter and was therefore a bar to a murder prosecution.

\textit{Lesser Included Offenses — Automobile Murder}

In \textit{State v. Patterson}\textsuperscript{18} the defendant was convicted of second degree murder after he voluntarily participated in a drag race which resulted in three deaths. The "intent to kill," a necessary element to a successful murder prosecution, was inferred by the defendant's awareness of the probability of the final result. The defendant requested the court to charge first and second degree manslaughter as lesser included offenses. The trial court held that second degree manslaughter was not an included offense and refused to charge on first degree manslaughter. The court instructed the jury that the defendant could have been charged with second degree manslaughter which did not require "intent to kill," but was not so charged at the prosecutor's choice, and also instructed the jury that it must determine whether there was sufficient evidence to infer "intent

\textsuperscript{15} \textit{Ohio Rev. Code} §§ 2943.03-.04.
\textsuperscript{16} 177 N.E.2d 697 (Ohio C.P. 1961).
\textsuperscript{17} Section 2945.14 states: "If it appears during the trial and before submission to the jury or court, that a mistake has been made in charging the proper offense in the indictment or information, the court may order a discontinuance of trial without prejudice to the prosecution."
\textsuperscript{18} 172 Ohio St. 319, 175 N.E.2d 741 (1961).
to kill." The court of appeals reversed the conviction of murder in the second degree, holding that the jury should have been instructed on first degree manslaughter as a lesser included offense. The Supreme Court of Ohio affirmed the conviction, holding that the defendant could not have been prejudiced since the refusal to charge first degree manslaughter, in effect, was a directed verdict of the lesser offense.

A court need not in every case instruct the jury on lesser included offenses unless necessitated by the facts. The court's opinion in this case decries the tendency on the part of many trial courts to instruct juries on every possible included offense whether warranted by the facts or not. In the opinion of this author juries should not be allowed the determination of punishment which in effect the multiplicity of choice allows.

Circumstantial Evidence

In a burglary prosecution the state established that: (1) the store burglarized had been closed from noon one day until eight o'clock a.m. the following day; (2) no authorized person was there during those hours; (3) upon reopening, it was noticed that the skylight was broken; (4) goods were missing; (5) the skylight was visible from neighboring buildings; (6) the defendant performed his regular cruiser duty between eight o'clock a.m. and four o'clock p.m. on the day in question; and (7) the defendant's fingerprints were discovered near the skylight to the store.

On these facts the defendant was convicted of burglary in the night season. The court of appeals held that the state had failed to prove "night season," and, there being no daytime included offenses, ordered the defendant discharged. The Ohio Supreme Court affirmed the conviction. The court held that the jury, applying the "common experience of mankind" to the determination of the time a person bent on burglary would choose, was justified in convicting on this circumstantial evidence alone.

Criminal Law

Embezzlement

The defendant was tried and convicted as an aider and abettor to the crime of embezzlement in State v. Glaros. The principal had already pleaded guilty to embezzlement. The principal, an insurance adjustor, had presented false and fraudulent claims to his company causing the insurer to issue improper drafts. The appellate court reversed the conviction of the accessory on several grounds. One interesting ground for this re-

universal was that the state had not proven that the principal had embezzled. The court held that the acts of the principal did not amount to obtaining funds from an employer by virtue of employment, which is an element required for embezzlement. The court stated that the acts of the principal probably amounted to larceny by trick or false pretenses.21

**Obscenity**

In *State v. Jacobellis*22 the defendant was convicted of knowingly possessing and knowingly exhibiting a movie entitled “The Lovers,” or “Les Amants.” The three-judge trial court, after viewing the movie, applied the standard set by the United States Supreme Court in *Roth v. United States*.23 The court of appeals affirmed the conviction, holding that obscenity is not within the area of the constitutionally protected freedoms of the first amendment. The reviewing court also saw the movie and incorporated much of the written opinion of the trial court in its decision. Both the trial and appellate court in describing the movie stated: “In a tantalizing and increasing tempo the sexual appetite is whetted and lascivious thoughts and lustful desires are intensely stimulated.”24

**Bigamy — A New Statute**

In 1960 a defendant was discharged at a preliminary hearing on a bigamy charge since the evidence disclosed that the second marriage was consummated in Indiana.25 The Ohio statute at that time required venue

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21. The Supreme Court of Ohio affirmed the reversal in 173 Ohio St. 63, 180 N.E.2d 134 (1962), stating in syllabus 1: “An employee who comes into possession of money or property of his employer by the commission of a trespass or obtained such money or property by larceny, larceny by trick, or false pretenses cannot convert or reconvert such money or property thus unlawfully obtained to his own use so as to become guilty of the crime of embezzlement.”


23. 354 U.S. 476 (1957). The trial court in the *Jacobellis* case cited syllabus 4(c) of the *Roth* case as the test to be applied: “The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.”

24. The Supreme Court of Ohio affirmed the court of appeals in *State v. Jacobellis*, 173 Ohio St. 22, 179 N.E.2d 777 (1962). The court after viewing the film held that the film was “filth for money’s sake.” Counsel for the defendant have indicated that a petition for certiorari will be filed in the United States Supreme Court. Since the Supreme Court has held obscenity to be a mixed question of law and fact, if admitted, “The Lovers” may receive the equivalent of a trial *de novo* in that Court.

It is interesting to note that in *State v. Warth*, 173 Ohio St. 15, 179 N.E.2d 772 (1962), the Ohio Supreme Court reversed a misdemeanor conviction of a defendant for possessing and exhibiting “The Lovers.” The court held that section 2905.342 of the Ohio Revised Code was unconstitutional in that there was no reference to knowledge or scienter on the part of the accused. See also *State v. Wetzel*, 173 Ohio St. 16, 179 N.E.2d 773 (1962).